

CHAPTER Elec 200 PRACTICE AND PROCEDURE

PART Elec 201 PURPOSE AND APPLICABILITY

Elec 201.01 Purpose. The purpose of this chapter is to adopt rules of practice and procedure for adjudicative proceedings conducted by the board governing the conduct of administrative hearings. The provisions of these rules are intended to supplement the procedures established by RSA 541-A and RSA 319-C.

Elec 201.02 Applicability. The rules in this chapter shall apply to any adjudicative proceeding conducted by the board.

PART Elec 202 DEFINITIONS

Elec 202.01 “Appearance” means a written notification to the board that a party or a party’s representative intends to actively participate in a hearing.

Elec 202.02 “Board” means “board” as defined in RSA 319-C:2, II.

Elec 202.03 “Hearing” means “adjudicative proceeding” as defined in RSA 541-A:1, I, namely, “the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.”

Elec 202.04 “Motion” means a request to the presiding officer for an order or ruling directing some act to be done in favor of the party making the motion, including a statement of justification or reasons for the request.

Elec 202.05 “Party” means “party” as defined in RSA 541-A:1, XII, namely, “each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party.” The term “party” includes all intervenors in a hearing, subject to any limitations established pursuant to RSA 541-A:32, III.

Elec 202.06 “Person” means “person” as defined in RSA 541-A:1, XIII, namely, “any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.”

Elec 202.07 “Natural person” means a human being.

Elec 202.08 “Presiding officer” means “presiding officer” as defined in RSA 541-A:1, XIV.

Elec 202.09 “Proof by a preponderance of the evidence” means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not to be true.

PART Elec 203 PRESIDING OFFICER; WITHDRAWAL AND WAIVER OF RULES

Elec 203.01 Presiding Officer.

(a) All hearings shall be conducted by a member of the board appointed or authorized to serve as a presiding officer.

(b) A presiding officer shall have the authority to:

- (1) Regulate and control the course of a hearing;
- (2) Facilitate an informal resolution of a hearing;

- (3) Administer oaths and affirmations;
- (4) Receive relevant evidence and exclude irrelevant, immaterial or unduly repetitious evidence;
- (5) Rule on procedural requests, including adjournments or continuances, at the request of a party or on the presiding officer's own motion;
- (6) Interview and examine witnesses, as necessary;
- (7) Make a complete record of any hearing, as specified in RSA 541-A:31, VI, including all relevant matters; and
- (8) Take any other action consistent with applicable statutes, rules and case law necessary to conduct and complete the hearing in a fair and timely manner.

Elec 203.02 Withdrawal of Presiding Officer or Board Member.

(a) A presiding officer or board member shall, upon his/her own initiative or upon the motion of any party, withdraw from a hearing for good cause.

(b) Good cause shall exist if a presiding officer or board member:

- (1) Has a direct interest in the outcome of a hearing, as a result of a current or prior personal or business relationship with a party, witness or representative;
- (2) Has made statements or engaged in behavior that objectively demonstrates that he/she has prejudged the facts of a case; or
- (3) Personally believes that he/she cannot fairly judge the facts of a case.

(c) Mere knowledge of the issues by a party or any witness shall not constitute good cause for withdrawal.

Elec 203.03 Waiver or Suspension of Rules. The board shall not permit a waiver of these rules.

PART Elec 204 FILING, FORMAT AND DELIVERY OF DOCUMENTS

Elec 204.01 Date of Issuance or Filing.

(a) The date noted on any document from the board shall be rebuttably presumed to be the date the document was issued by the board.

(b) The date stamp placed on any document by the board in the normal course of business shall be rebuttably presumed to be the date the document was filed with the board.

Elec 204.02 Format of Documents.

(a) All correspondence, pleadings, motions or other documents shall:

- (1) Include the title and docket number of the hearing, if known;
- (2) Be typewritten or legibly printed on paper 8 ½ by 11 inches in size;
- (3) Be signed by the party or the representative of the party; and

(4) Include a statement certifying that a copy of the document has been delivered to all parties in accordance with Elec 204.03.

(b) The party or the representative's signature on a document filed with the board shall constitute certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file it;
- (3) There are sufficient grounds to support the document, to the best of the signer's knowledge, information and belief; and
- (4) The document has not been filed for purposes of delay.

Elec 204.03 Delivery of Documents.

(a) Copies of all pleadings, motions, exhibits, memoranda or other documents filed by any party to a hearing shall be delivered to all other parties.

(b) All notices, orders, decisions or other documents issued by the presiding officer or board shall be delivered to all parties.

(c) All documents relating to a hearing shall be made by personal delivery, by electronic transmission or by sending a copy of the document, through first class United States mail, postage prepaid addressed to the last address given to the board by the party.

(d) When a party has a representative appearing on his/her behalf, delivery of a document to the address stated on the appearance filed by the representative shall constitute delivery to the party.

PART Elec 205 TIME PERIODS

Elec 205.01 Computation of Time.

(a) Unless otherwise specified, all time periods referenced in these rules shall be calendar days.

(b) Computation of any period of time shall begin on the day after the action that set the time period in motion, and shall include the last day of the period of time so computed.

(c) If the last day of the period of time computed falls on a Saturday, Sunday or legal holiday, the period of time shall extend to the end of the next day that is not a Saturday, Sunday or legal holiday.

PART Elec 206 MOTIONS

Elec 206.01 Motions; Objections.

(a) Motions shall be in written form and filed with the presiding officer, unless made in response to a matter asserted for the first time at a hearing or on the basis of information that was not received in time to prepare a written motion.

(b) Oral motions and any objection to such motions shall be recorded in full in the transcript of the hearing. If the presiding officer finds that a motion requires additional information in order to be fully and fairly considered, the presiding officer shall direct the moving party to submit the motion in writing, with supporting information.

(c) Objections to written motions shall be filed within 30 days of the date of the motion.

(d) Failure to object to a motion shall not in and of itself constitute grounds for granting the motion.

(e) The presiding officer shall rule upon a motion after full consideration of any objection and other factors relevant to the motion.

PART Elec 207 NOTICE OF HEARING; APPEARANCES; PRE-HEARING CONFERENCES; PUBLIC ACCESS; SETTLEMENT AGREEMENTS

Elec 207.01 Commencement of Hearing. A hearing shall be commenced when a notice of hearing is issued by the board in accordance with Elec 207.03.

Elec 207.02 Docket Numbers. A docket number shall be assigned to each matter to be heard which shall appear on the notice of hearing and all subsequent orders or decisions of the board.

Elec 207.03 Notice of Hearing.

(a) A notice of hearing issued by the board shall include:

- (1) The date, time, place and nature of the hearing;
- (2) The legal authority pursuant to which a hearing is to be held;
- (3) A reference to the particular statutes and rules involved;
- (4) A short and plain statement of the issues presented;
- (5) A statement that each party has the right to have an attorney represent the party at the party's own expense; and
- (6) A statement that each party has the right to have the board provide a certified shorthand court reporter at the party's expense and that any such request shall be submitted in writing no later than 10 days prior to the date of the scheduled hearing.

Elec 207.04 Appearances and Representation.

(a) A party or the party's representative shall file an appearance that includes the following:

- (1) A brief identification of the matter;
- (2) A statement as to whether or not the representative is an attorney and if so, whether the attorney is licensed to practice in New Hampshire; and
- (3) The party or representative's daytime address and telephone number.

(b) A party may be represented:

- (1) Pro se;
- (2) By an attorney; or
- (3) Pursuant to RSA 311:1.

Elec 207.05 Prehearing Conference.

(a) The presiding officer, upon his/her own initiative, or upon request of a party, shall schedule a prehearing conference to consider:

- (1) Offers of settlement;
- (2) Simplification of the issues;
- (3) By consent of the parties, stipulations or admissions as to issues of fact or proof;
- (4) Limitations on the number of witnesses;
- (5) By consent of the parties, changes to standard procedures requested during the hearing;
- (6) Consolidation of examination of witnesses; or
- (7) Any other matters that assist in the disposition of the hearing.

Elec 207.06 Public Access. All hearings before the board shall be open to the public.

Elec 207.07 Settlement Agreements.

(a) Parties may settle any case that is scheduled for a hearing before the board at any time prior to a decision on the merits.

(b) All settlement agreements shall be submitted, in writing, to the board for approval.

(c) The board shall request parties to submit offers of proof or ask questions pertaining to the reasons for a potential settlement, if necessary, before approving any settlement agreement.

PART Elec 208 ROLE OF BOARD STAFF

Elec 208.01 Role of Board Staff in Hearings. Board staff who has been designated by the board to present the board's case shall fully participate in the hearing. Other board staff shall have no role in any hearing before the board, unless called as a witness or granted status as a party or intervenor.

PART Elec 209 INTERVENTION

Elec 209.01 Intervention.

(a) A non-party may intervene in a matter pending before the board under the provisions of RSA 541-A:32, by filing a petition that states facts demonstrating that the non-party's rights or other substantial interests might be affected by the proceeding or that the non-party qualifies as an intervenor under any provision of law.

(b) If the presiding officer determines that intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearing, the petition for intervention shall be granted.

(c) A person whose petition for intervention has been granted shall be admitted as a party.

PART Elec 210 CONTINUANCES AND FAILURE TO APPEAR FOR HEARING

Elec 210.01 Continuances.

(a) A request for continuance of a hearing may be made by any party.

(b) A continuance shall be granted by the presiding officer for good cause.

(c) Good cause shall include the following:

(1) A party, witness or representative of a party is unavailable for the hearing;

(2) There is a likelihood that the parties have reached a settlement; or

(3) Any other circumstances that demonstrate that a postponement would assist in resolving the case fairly.

(d) The presiding officer shall issue a written scheduling order stating the date, time and place of the continued hearing as soon as practicable or, if known at the time of the hearing, state the rescheduled date, time and place on the record.

Elec 210.02 Failure to Appear. If any party to whom a notice of hearing has been given in accordance with Elec 207.03 fails to appear for the hearing, the presiding officer shall:

(a) Dismiss the case, if the party who failed to appear has the burden of proof; or

(b) Hear the testimony and receive the evidence, if the party who has the burden of proof is present.

PART Elec 211 REQUESTS FOR INFORMATION OR DOCUMENTS

Elec 211.01 Voluntary Production of Information.

(a) Each party shall, in good faith, attempt to make a complete and timely response to requests for the voluntary production of information or documents relevant to the hearing.

(b) When there is a dispute between the parties concerning a request for the voluntary production of information or documents, any party may file a motion to compel the production of the requested information pursuant to Elec 211.02.

Elec 211.02 Motions to Compel Production of Information.

(a) Any party may file a motion requesting the presiding officer to compel the parties to comply with the production of information. The motion shall be filed at least 30 days prior to the date of the scheduled hearing, or as soon as possible after receipt of the notice of hearing if the notice was issued no later than 30 days prior to the date of the scheduled hearing.

(b) The motion shall:

(1) Set forth in detail the factors that justify the request for information; and

(2) List with specificity the requested information.

(c) If the presiding officer determines that requests for information are necessary for a full and fair presentation of the evidence at the hearing, the motion shall be granted.

Elec 211.03 Mandatory Pre-Hearing Disclosure of Witnesses and Exhibits. The parties shall exchange a list of all witnesses along with a brief summary of their testimony, and copies of all documents or exhibits no later than 5 days prior to the date of the scheduled hearing.

PART Elec 212 RECORD, PROOF, EVIDENCE AND DECISIONS

Elec 212.01 Record of the Hearing.

(a) The board shall record the hearing by tape recording or other method that will provide a verbatim record.

(b) The board shall retain hearing recordings for at least 7 years from the date of the final appeal.

(c) If any person requests a transcript of a hearing, the board shall provide copies of the transcript to the requesting party, upon receipt of payment for the cost of the transcript.

(d) A party may request that the board provide a certified shorthand court reporter at the party's expense. A request shall be submitted in writing no later than 10 days prior to the date of the scheduled hearing.

Elec 212.02 Burden of Proof. Unless otherwise specified by law, the burden of proof shall be on the moving party.

Elec 212.03 Standard of Proof. Unless otherwise specified by law, the standard of proof shall be by a preponderance of the evidence, as defined in Elec 202.09.

Elec 212.04 Testimony; Order of Proceeding.

(a) All testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer.

(b) Any person or representative offering testimony, evidence or arguments shall state his/her name and role for the record.

(c) Testimony shall be offered in the following order:

(1) The party(s) bearing the burden of proof and such witnesses as the party may call; and

(2) The party(s) opposing the party bearing the burden of proof and such witnesses as the party may call.

Elec 212.05 Evidence.

(a) Receipt of evidence shall be governed by the provisions of RSA 541-A:33.

(b) All documents, materials and objects offered as exhibits shall be admitted into evidence unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.

(c) All objections to the admissibility of evidence shall be stated as early as possible in the hearing, but not later than the time when the evidence is offered.

(d) Transcripts of testimony and documents or other materials, admitted into evidence shall be public records unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5 or applicable case law.

Elec 212.06 Proposed Findings of Fact and Conclusions of Law.

(a) Any party may submit proposed findings of fact and conclusions of law to the presiding officer prior to or at the hearing.

(b) Upon request of any party, or if the presiding officer determines that proposed findings of fact and conclusions of law would serve to clarify the issues presented at the hearing, the presiding officer shall specify a date after the hearing for the submission of proposed findings of fact and conclusions of law.

(c) In any case in which proposed findings of fact and conclusions of law are submitted, the decision shall include rulings on the proposals.

Elec 212.07 Closing the Record.

(a) After the conclusion of the hearing, the record shall be closed and no other evidence shall be received, except as allowed by paragraph (b), below and Elec 212.08.

(b) Before the conclusion of the hearing, a party may request that the record be left open to allow the filing of specified evidence not available at the hearing. If the other parties to the hearing have no objection or if the presiding officer determines that such evidence is necessary to a full consideration of the issues raised at the hearing, the presiding officer shall keep the record open for the period of time necessary for the party to file the evidence.

Elec 212.08 Reopening the Record. At any time prior to the issuance of a decision on the merits, the presiding officer, on the presiding officer's own initiative or on the motion of any party, shall reopen the record to receive relevant, material and non-duplicative testimony, evidence or arguments not previously received, if the presiding officer determines that such testimony, evidence or arguments are necessary to a full and fair consideration of the issues to be decided.

Elec 212.09 Decisions.

(a) For the purpose of rendering a decision, 3 members of the board, one of whom is a public member, shall constitute a quorum, in accordance with RSA 319-C:6.

(b) A board member shall not participate in making a decision unless he/she personally heard the testimony in the case, unless the matter's disposition does not depend on the credibility of any witness and the record provides a reasonable basis for evaluating the testimony.

(c) If a presiding officer has been delegated the authority to conduct a hearing in the absence of a majority of the members of the board, the presiding officer shall submit to the board a written proposal for decision, which shall contain a statement of the reasons for the decision and findings of fact and rulings of law necessary to the proposed decision.

(d) If a proposal for decision in a matter not personally heard by the board is adverse to a party to the proceeding other than the board itself, the board shall serve a copy of the proposal for decision on each party to the proceeding and provide an opportunity to file exceptions and present briefs and oral arguments to the board.

(e) A proposal for decision by the presiding officer shall become a final decision by the board if it meets the criteria set forth in (c) above.

(f) All decisions shall be in writing and rendered within 45 days of the conclusion of the hearing.

(g) The board shall keep a decision on file in its records for at least 7 years following the date of the final decision or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to rules adopted under RSA 5:40.

PART Elec 213 MOTION FOR REHEARING

Elec 213.01 Purpose. The rules in this part are intended to supplement any statutory provisions that require or allow a person to request a rehearing of a decision of the board prior to filing an appeal of the decision.

Elec 213.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a rehearing of a decision prior to filing an appeal of the decision.

Elec 213.03 Filing and Content of Motion.

(a) A motion for rehearing shall be filed within 30 days of the date of the board decision or order.

(b) A motion for rehearing shall:

(1) Identify each error of fact, error of reasoning, or error of law that the moving party requests to have reconsidered;

(2) Describe how each error causes the board's decision to be:

- a. Unlawful, unjust or unreasonable;
- b. Illegal in respect to jurisdiction, authority or observance of the law;
- c. An abuse of discretion; or
- d. Arbitrary, unreasonable or capricious;

(3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and

(4) Include any argument or memorandum of law the moving party files.

Elec 213.04 Standard for Granting Motion for Rehearing. A motion for rehearing in a case subject to rehearing pursuant to RSA 319-C:12-b shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable.

Elec 213.05 Decision on Motion for Rehearing. The board shall grant or deny a motion for rehearing, or suspend the order or decision pending further consideration at the next scheduled board meeting following the filing of the motion for rehearing.

PART Elec 214 RULEMAKING

Elec 214.01 How Adopted. A board rule, or any amendment or repeal thereof, shall be adopted by an order and pursuant to the process required by RSA 541-A. Rules may be proposed by any person through the petition process. The order adopting a rule shall contain a concise statement of the statutory authority for the rule, the reasons for its adoption, and any other data required by statute.

Elec 214.02 Explanation after Adoption.

(a) Any person may request an explanation regarding adoption of the rules pursuant to RSA 541-A:11, VII by submitting a request to the board.

(b) The request shall be considered at the next scheduled board meeting and the board shall issue a response within 45 days after consideration.

Elec 214.03 Petition for Rulemaking.

(a) Any person may petition the board to commence a rulemaking proceeding for the purpose of adopting, amending, or repealing a rule.

(b) The petition shall contain:

- (1) The text of the proposed rule or a statement of the particular results intended by the petitioner to flow from the implementation of the proposed rule;
- (2) If the petitioner proposes to amend an existing rule, the specific insertions and deletions sought;
- (3) If the petitioner proposes to repeal an existing rule, an identification of the particular rule sought to be repealed;
- (4) Any data or argument the petitioner believes would be useful to the agency in deciding whether to commence a rulemaking proceeding; and
- (5) A statement specifying the reasons the petitioner believes such adoption, amendment, or repeal should be undertaken by the board.

Elec 214.04 Disposition of Petition.

(a) The board shall, within 30 days from receipt of the petition, by order, grant or deny a petition for rulemaking. Before issuing that order, however, the board shall request additional data or argument from the petitioner or seek such information from others if the board determines that it needs such additional data, argument, or information to be able to render a decision on the merits of the petition.

(b) A petition shall be granted by the board if the board determines that the requested action falls within the board's authority, conforms to substantive provisions of statutes implemented by the board, and is consistent with policy considerations underlying the board's purpose.

(c) If the petition is denied, the board shall state the reason therefore in the order. Petitions for rulemaking shall be evaluated by the board in conformance with RSA 541-A.

PART Elec 215 DECLARATORY RULINGS

Elec 215.01 Petitions.

(a) Any person may request a declaratory ruling from the board on matters within its jurisdiction by filing an original and 11 copies of a petition pursuant to Elec 204.02.

(b) Such a petition shall also set forth the following information:

- (1) The exact ruling being requested;

(2) The statutory and factual basis for ruling, including any supporting affidavits or memoranda of a law; and

(3) A statement as to how and why the issuance of a ruling on this subject would benefit the petitioner.

Elec 215.02 Action on Petitions.

(a) The petitioner shall provide such further information or participate in such evidentiary or other proceedings as the board shall direct after reviewing the petition and any replies received.

(b) Upon review and consideration, the board shall within 90 days respond to the petition giving its decision in writing.

(c) The decision shall be in accordance with Elec 212.09(f).